No. 12725

In the United States Court of Appeals for the Ninth Circuit

MARGARET WHEELER HESS AND HARRY WESTBERG, INDIVIDUALLY AND AS DIRECTORS AND MEMBERS OF THE SMALL PROPERTY OWNERS LEAGUE, A NONPROFIT UNINCORPORATED ASSOCIATION, AND FOR AND ON BEHALF OF EACH AND ALL OF THE MEMBERS OF SAID ASSOCIATION, APPELLANTS

v.

TIGHE WOODS, THE HOUSING EXPEDITER OF THE UNITED STATES GOVERNMENT, OFFICE OF THE HOUSING EXPEDITER, DOES I TO XXX, INCLUSIVE, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

This is an appeal from an order entered October 14, 1950, of the United States District Court for the Southern District of California, Judge Carter sitting, dismissing the complaint, denying appellants' application for a temporary restraining order and preliminary injunction to direct the Housing Expediter to terminate rent controls pursuant to Section 204 (j) (3) of the Housing and Rent Act of 1947, as amended;

and vacating the alternative writ of mandate heretofore issued by Judge W. Turney of the Superior Court, County of Los Angeles, California. The complaint, designated as a petition for writ of mandate and injunction, was originally filed in the Superior Court in the State of California, in and for the County of Los Angeles, and removed to this Court by the appellee, Tighe E. Woods, Housing Expediter of the Office of the Housing Expediter. Margaret Wheeler Hess and Harry Westberg sue individually and as Directors and Members of the Small Property Owners League which is alleged to be a nonprofit unincorporated association of owners of rental housing accommodations and real property in the City of Los Angeles (Par. 3, Complaint). As principal relief, the appellants pray that the Court grant a writ of mandamus commanding the appellee, Housing Expediter, to declare the decontrol of rents in the City of Los Angeles, pursuant to the provisions of Section 204 (j) (3) of the Housing and Rent Act of 1950 (U. S. C., App. 1894) (j) (3).[1] In addition, appellants

[1] The applicable law, Section 204 (j) (3) of the Housing and Rent Act of 1950 (50 U. S. C., App. 1894, (j) (3)), is as follows:

"(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town, or village, or in the unincorporated area of any county upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town, or village or unincorporated area in such county: *Provided*, That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area."

seek a negative injunction enjoining Ben C. Koepke, Area Rent Director, and other employees of the Office of the Housing Expediter from issuing any maximum rent orders or adjusting maximum rents in Los Angeles, from interfering with eviction proceedings by property owners in Los Angeles, or doing any act directed toward the administration of rent control in Los Angeles pursuant to the Housing and Rent Act of 1947, as amended.

The statutory provisions and proceedings of the Los Angeles City Council, leading to the present action are, briefly, as follows:

Section 204 (j) (3) of the Act requires the Housing Expediter to terminate federal rent control when the governing body of a locality meets the following conditions: (1) holds a public hearing, after ten days' notice, (2) makes a finding reached as a result of such hearing that a rental housing shortage requiring rent control no longer exists, and (3) transmits to the Housing Expediter such finding by a resolution adopted for that purpose in accordance with applicable local law.

On July 14, 1950, the City Council of Los Angeles, the appropriate governing body of that City, published a notice of a public hearing to be held on July 28, 1950, to determine whether or not there existed a shortage in rental housing accommodations in the city as to require the continuance of federal rent control. A hearing, the character of which is in dispute, was held on July 28, 1950, and, on the same day, the City Council, by a vote of 10 to 4, adopted a resolution, assertedly as a result of the public hearing,

finding that "there no longer exists such a shortage in rental housing accommodations as to require rent control in the City of Los Angeles, County of Los Angeles, State of California" (Par. 5 of Complaint). The resolution was received by the Housing Expediter on August 2, 1950 (Par. 6). Thereafter, on August 14, 1950, before any action on the resolution had been taken by the Housing Expediter, certain tenants of the City of Los Angeles filed a complaint in the United States District Court for the District of Columbia seeking an injunction to restrain the Housing Expediter from taking any action on the Los Angeles resolution which would cause the decontrol of maximum rents in the City (Par. 6) *Miller* v. *Woods* (D. C. D. C. No. 3528–50). The City of Los Angeles and the Small Property Owners League (plaintiff herein) intervened (Par. 6). A temporary restraining order, obtained on August 14, 1950, upon the filing of the complaint (Par. 6), was in effect throughout the proceedings in the lower court until that court dismissed the complaint.

Upon appeal the Court upheld the order dismissing the complaint upon the sole ground that the jurisdictional amount of $3,000 was not shown to be present (*Miller* v. *Woods* (App. D. C. No. 10764, October 6, 1950)). The plaintiffs in the *Miller* case then applied to Chief Justice Vinson for a stay which was denied on October 7, 1950.[2]

[2] Thereupon, the tenants brought suit in the Municipal Court of the District of Columbia for like injunctive relief. The City of Los Angeles and the several landlords including plaintiff, Small Property Owners' League, again intervened on defendant's behalf.

On October 4, while the *Miller* case was still pending in the Circuit Court of Appeals for the District of Columbia, the instant suit was instituted in the Superior Court of the State of California. On October 9, 1950, the complaint was amended substituting Ben C. Koepke, Area Rent Director for the Los Angeles Defense-Rental Area in place of Doe 1 wherever it appears in the complaint. Service of the summons, Complaint, Writ, and Points and Authorities were served on appellees Tighe E. Woods, Housing Expediter, and Ben C. Koepke by personally leaving copies thereof with Koepke at the latter's office in Los Angeles. On October 10, 1950, the action was removed to the Federal District Court, and upon request of appellants, the District Court agreed to hear appellants' application for a temporary restraining order and preliminary injunction on October 13, 1950. Appellees' motion to dismiss the complaint was made returnable the same day.

Upon the hearing, appellants abandoned their count for mandatory injunction to compel the Expediter to act, and declared they sought only negative injunctive relief against the Area Rent Director.

After hearing, the court below concluded that the complaint should be dismissed as against Tighe E.

By memorandum opinion handed down October 23, 1950, the Court (Hon. George P. Barse, Chief Judge) determined that the complaint should be dismissed on the grounds that the suit was, in legal effect, against the United States, which had not consented to be sued; that the action was premature, since the Housing Expediter had not yet acted upon the resolution; and that plaintiff had failed to exhaust an apparently available remedy by not proceeding in a state court in California.

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Woods, Housing Expediter, because jurisdiction was lacking over his person and that he could only be sued in the District of Columbia, his official residence; that the suit was premature; and that since the action sought to control the exercise of discretion by a government official it was beyond the power of a court to grant. The court below also dismissed the action against Ben C. Koepke, Area Rent Director, on the ground that the Housing Expediter is an indispensable party to the action; that the action is premature;[3] and that the functions exercised by the Housing Expediter pursuant to Section 204 (j) (3) of the Act are not of a ministerial character. From the order dated October 14, 1950 dismissing the complaint and deny-

[3] On October 23, 1950, after the court below had rendered its ruling, the Housing Expediter rejected the resolution of the City Council of Los Angeles by a letter addressed to that body. In view of that fact, this action may no longer be considered as premature.

Following issuance of the letter, suit was filed by a Los Angeles landlord, Frank W. Babcock, in the District Court for the District of Columbia, against the Housing Expediter for a mandatory injunction to compel the latter to terminate rent controls in Los Angeles. Simultaneously, application was made by Babcock for a preliminary injunction. The City of Los Angeles intervened in the suit. The Housing Expediter moved to dismiss this suit upon various jurisdictional grounds. After argument, the District Court (Judge Holtzoff sitting) denied the motion to dismiss, passed over the question of preliminary injunction, and granted the mandatory final injunction directing the Housing Expediter to terminate controls in Los Angeles. The Housing Expediter filed an appeal, and on November 20, 1950, pending appeal, the Circuit Court for the District of Columbia granted a stay of the district court's order. Appeal in this case was expedited and heard on November 22, 1950. On November 24, 1950, the Appellate Court reversed and dismissed the landlord's complaint.

ing a temporary restraining order and other injunctive relief against other appellees, appellants appealed, and pending appeal, sought a restraining order and a temporary injunction.

This Court rejected appellants' request for injunctive relief pending appeal with the statement that "No order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated."

Contrary to appellants' contentions, it will be shown hereafter,

(1) that the court below properly dismissed the complaint and denied injunctive relief as to Tighe E. Woods, Housing Expediter, upon the ground that it lacked jurisdiction over him;

(2) that the court below was equally right in dismissing the complaint against other defendants, including Ben C. Koepke, Area Rent Director, upon the ground that the Housing Expediter is an indispensable party to the action, and because the functions which he exercises under the Act are not of a ministerial character;

(3) that the judgment below dismissing the complaint may also be sustained upon the grounds (a) that the action is one against the United States which has not consented to be sued; (b) that plaintiffs have no standing to sue or right to judicial review; and (c) that the plaintiffs fail to state a claim upon which relief may be granted in that they show no irreparable injury and in that they have an adequate remedy at law;

(4) that the court below did not abuse its broad equitable discretion in denying appellants' application for preliminary injunctive relief.

These contentions will be considered in order.

But preliminarily, it should be noted that appellants' action is predicated upon a resolution adopted by the City Council of Los Angeles in accordance with applicable law. The Appellate Court for the District of Columbia in *Babcock* v. *Woods,* No. 10827 on November 24, 1950, declared this resolution to be invalid as not complying with applicable law. The City of Los Angeles was a party to this action and is bound by the Court's ruling. Since the premise upon which this action rests has now been held to be untenable, there can be no escape from the conclusion that the action falls with the premise, and can no longer be sustained regardless of the outcome of any other issue raised in this case.

ARGUMENT

I

The court below correctly held it lacked jurisdiction over Tighe E. Woods, Housing Expediter, because he does not reside within the jurisdiction of this court

A. Objections to venue and jurisdiction of the Court over the person of defendants may be joined in a Motion to Dismiss with other grounds without waiving such jurisdictional objections

Before considering those grounds of the motion based upon objections to venue and jurisdiction over the person of the defendant Housing Expediter, reference is made to Rule 12 (b) of the Rules of Civil Procedure which provides that no defense or objection "is waiving by being joined with one or more defenses

or objections" in a responsive pleading or motion. And Civil Rule 12 (g) provides that all defenses and objections available to a party should be joined in one motion. Under these rules appellants may not be held to have waived jurisdictional objections by the general motion to dismiss (*Blank* v. *Bitker,* 135 F. 2d 962, 966 (C. A. 7th); *Orange Theater Corp.* v. *Rayherzst Amusement Corp.,* 139 F. 2d 871 (C. A. 3d)).

Considering Rule 12 in *Orange Theater Corp.* v. *Rayherstz Amusement Corp., supra,* the Court holds that "A defendant need no longer appear specifically to attack the court's jurisdiction over him" (139 F. 2d 874). In accord is the recent decision of *Federal Landlords Committee* v. *Woods,* 9 F. R. D. 622 (S. D. N. Y., 3 Judge Court, L. Hand, C. J. Leibell, J. Ryan, J.).

B. The Housing Expediter does not reside within the jurisdiction of this court, and may be sued only in the District of Columbia, where he resides

The applicable statute, 28 U. S. C. 1391 (b), which is a codification of Section 51 (a) of the Judicial Code (28 U. S. C. 112 (1946 ed.)), now repealed,[4] plainly gives a defendant in a civil suit in a federal

[4] The pertinent part of Section 51 (a) of the Judicial Code before the codification of Title 28 reads as follows:

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * * "

district court the privilege of being sued only in the judicial district of which he is a resident. That Section reads as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

In the instant case, it is clear that defendant, Tighe E. Woods, has at no time since the institution of this suit been a resident of California. Section 206 (e) of the Housing and Rent Act of 1947, as amended, provides that the principal office of the Housing Expediter shall be in the District of Columbia, and the affidavit filed by defendant Woods in support of his motion to dismiss states that his official residence has at all times since November 1, 1947, been in the District of Columbia, that his home is not in the State of California, and that he is not an inhabitant of that State.

It has been held under Section 51 (a) of the Judicial Code and its substantially similar predecessor statutes that, in the absence of a special statute to the contrary, a civil suit may not be maintained against a defendant without his consent in a federal district court except in the judicial district of which he is a resident at the time of suit[5] (*Macon Grocery Co.* v.

[5] Rule 4 (f) of the Federal Rules of Civil Procedure which outlines the territorial limits of effective service, provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *"

Atlantic Coast Line R. R. Co., 215 U. S. 501; *Male* v. *Atchison, etc. Ry. Co.,* 240 U. S. 97; *Robertson* v. *Labor Board,* 268 U. S. 619; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 168).

Section 51 (a) of the Judicial Code made no distinction between a federal officer and a private person (nor does 28 U. S. C. 1391 (b) make any such distinction), and both the Supreme Court and the lower federal courts have long held and recognized that Section 51 (a) affords the same protection to federal officers as it did to private persons (*Berlinsky* v. *Woods,* 178 F. 2d 265 (C. A. 4th), certiorari denied, 70 S. Ct. 806; *Federal Landlords Committee, Inc., et al.* v. *Woods, Housing Expediter* (S. D. N. Y.), 3 Judge Court (L. Hand, Leibell, and Ryan sitting), 9 F. R. D. 622; *Butterworth* v. *Hill,* 114 U. S. 128; *United States* v. *Tacoma Oriental S. S. Co.,* 86 F. 2d 363 (C. A. 9th); *Smart* v. *Woods* (C. A. 6th), No. 11,157, October 27, 1950; *Peoples Bank* v. *Federal Reserve Bank of San Francisco,* 58 F. Supp. 25 (N. C. Cal. S. D.) Roche, J., appeal dismissed, 149 F. 2d 850 (C. A. 9th); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. 2d 97 (C. A. 5th), certiorari denied, 229 U. S. 559; *Howard* v. *United States ex rel. Alexander,* 126 F. 2d 667 (C. A. 10th), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Krug* v. *Fox,* 161 F. 2d 1013, 1020 (C. A. 4th); *Jewel Productions, Inc.* v. *Morgenthau,* 100 F. 2d 390 (C. A. 2d).

In *Berlinsky* v. *Woods,* 178 F. 2d 265 (C. A. 4th), an action was instituted by a tenant in the District Court of Maryland to compel the Housing Expediter

to carry out his duties under the Act. The Housing Expediter was served at his office in Washington. Sustaining an order of dismissal, the Court speaking through Judge Soper said on this point (p. 267):

> The District Court did not have jurisdiction over the Housing Expediter because his official residence is in Washington, in the District of Columbia, and the attempted service of process upon him in the District of Columbia was ineffective to confer jurisdiction upon the court. *Butterworth* v. *Hill,* 114 U. S. 128, 5 S. Ct. 796, 29 L. Ed. 119; *Federal Landlords Committee* v. *Woods,* D. C., S. D., N. Y. 9 F. R. D. 622.

The Supreme Court denied certiorari in this case on May 1, 1950, and denied rehearing on June 5, 1950 (70 S. Ct. 805).

It is elementary, therefore, that this suit against the Housing Expediter, who resides in the District of Columbia, could not be legally maintained in the United States District Court for the District of California without his consent.

Nor is the well-settled rule discussed above different merely because of appellants' contention that the action to be performed by the government official is of a ministerial capacity, and therefore equity will regard as done what ought to be done. As was said by this Court in *United States* v. *Tacoma Oriental S. S. Co.,* 86 F. 2d 363, 368 (C. A. 9th):

> Appellee and amici curiae both argue strongly that the proceeding is merely one to compel the performance of official ministerial duties. They thus concede that the basis of the proceeding is the breach of a ministerial duty. Their

remedy is one in personam, purely, and issuance of process by the lower court outside its district in such case is not authorized.

This decision was more recently followed in *In re Standard & Electric Co.,* 119 F. 2d 658 (C. A. 3rd).

Gibson v. *Chotteau,* 80 U. S. 92, and *Virginia Ship Building Corp.* v. *United States,* 22 F. 2d 38, 50, certiorari denied 276 U. S. 625, relied on in the *Amicus* brief filed previously, are not to the contrary. Neither case enunciates the principle that a court of equity may, in any *in personam* proceeding, exercise jurisdiction over a person who is an inhabitant of another district, or of a government official whose official residence is in another district. In each case cited above the court was dealing with a specific *res* (land in *Gibson,* and ships in *Virginia Ship Building*) as to which there was *in rem* jurisdiction. Here, the relief sought and decree, if granted, will be directed against the person of the Housing Expediter who is not a resident of California.

In appellants' brief (p. 20) reference is made to two cases decided by the Supreme Court holding that foreign corporations doing business in a state may be sued by service of process upon their agents residing in the state. Since the Housing Expediter is not a corporation, the inapplicability of these decisions is too apparent for further comment. Significantly, appellants cite no case in point. Accordingly, the court below was right in holding that it lacked jurisdiction over the Housing Expediter and that the attempted service of process upon the Housing Expe-

diter by serving the Area Rent Director in Los Angeles was wholly ineffective to confer jurisdiction.

II

Authority under Section 204 (j) (3) of the Act to terminate controls in cities is vested exclusively in the defendant, Housing Expediter, and he has the power to enforce the Act by delegation from the Attorney General. The defendant, Ben C. Koepke, Area Rent Director, is a subordinate of Tighe E. Woods who exercises no power whatever respecting termination of rent controls in cities under Section 204 (j) (3), or any enforcement powers. Any decree which contemplates enjoining the administration and enforcement of rent control in the entire City of Los Angeles because of action taken under Section 204 (j) (3) requires the Housing Expediter to be made a party to the suit. In the absence of jurisdiction over the Housing Expediter, the present action cannot be maintained against the Area Rent Director or other unnamed defendants

The complaint, as originally filed sought relief against one named defendant only, viz, the Housing Expediter. The principal relief sought was a mandatory injunction to compel the Expediter to terminate rent controls in Los Angeles. In the court below, appellants abandoned this count against the Housing Expediter. On familiar principles, having abandoned this count below, appellants are barred from raising it here on appeal.

By amended complaint, however, appellants substituted for one of the "Doe" Defendants, the name of Ben C. Koepke, Area Rent Director of Los Angeles. Appellants seek negative injunctive relief against Koepke, to restrain the latter "from issuing any orders relating to maximum rents" in Los Angeles, from interfering with any eviction proceed-

ings in Los Angeles, and from doing any act "having the effect of administering rent control in the City of Los Angeles."

Reliance by appellants upon this count requires the determination whether the Housing Expediter is an indispensable party to the action. If he is, then the action must be dismissed against Koepke, Area Rent Director and other defendants.

That the Housing Expediter is an indispensable party to the action, is clear from the fact that the extraordinary power of terminating rent controls pursuant to Section 204 (j) (3) of the Act is vested in the Expediter alone. Section 204 (j) (3) expressly provides that "The Housing Expediter shall terminate the provisions of this title in any * * * city * * *" where the requirements specified in the Act are satisfied. No one other than the Housing Expediter has been authorized to exercise this important power. Appellants in effect conceded this fact both by their allegations and prayer for relief. In these circumstances there can be no question but that any mandatory injunction to be entered in this case would bind the Housing Expediter alone and require him only to act as is prayed for in the complaint. Recognizing this fatal weakness in their case, appellants now seek to accomplish indirectly what cannot be done directly. Obviously, a decree against the Area Rent Director restraining him from enforcing and administering all rent controls in Los Angeles would have the same practical and legal effect as if the Expediter himself had been directed to terminate

rent controls in the city. That being so, there can be no escape from the conclusion that the court below correctly held that the decree sought in this case would require the Expediter "to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" within *Williams* v. *Fanning,* 332 U. S. 490; *Gnerich* v. *Rutter,* 265 U. S. 388 and related cases. See too, *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28; *Webster* v. *Fall,* 226 U. S. 507; *Moody* v. *Johnston,* 66 F. 2d 999, 1002 (C. A. 9th); *Moore* v. *Anderson,* 68 F. 2d 191, 193 (C. A. 9th); *May* v. *Maurer,* (C. A. 10th) No. 4082, Sept. Term 1950; *Berlinsky* v. *Woods,* 178 F. 2d 265 (C. A. 4th) certiorari denied 70 S. Ct. 805; *Jacobs* v. *Abern, Office of the Housing Expediter,* 176 F. 2d 338 (C. A. 7th); *Smart* v. *Woods* (C. A. 6th) No. 11157, Oct. 27, 1950.

The facts present in *Gnerich* v. *Rutter,* 265 U. S. 388, are particularly opposite to those present here. There the plaintiffs claimed that the limitation as to their sales of liquor in the permit issued them as licensed pharmacists under the National Prohibition Act was void and beyond authority vested in the prohibition commissioner by the pertinent regulations. The Commissioner of Internal Revenue was responsible for the administration of that Act. He had, *as authorized by the Act,* issued regulations which provided for and designated a prohibition commissioner as his general agent to issue and sign permits to sell liquor at retail, and which also provided for local prohibition directors to issue and sign permits to purchase liquor for use and sale under the permits

last mentioned. Plaintiffs' permit to sell liquor had been issued and signed by the prohibition commissioner, who in the exercise of the discretion vested in him by the regulations had imposed the condition complained of. Plaintiffs brought suit against the local prohibition director, who had refused to issue to them permits to purchase in excess of this limitation, seeking to restrain him from giving effect to the limitation. Although the Commissioner of Internal Revenue had delegated his authority and discretion to issue permits to the prohibition commissioner and prohibition directors, and the permit in question had been issued by the prohibition commissioner, who had imposed the limitation within the scope of the discretion delegated him, the Court, quoting *Warner Valley* v. *Smith, supra,* held that the Commissioner of Internal Revenue was an indispensable party to the proceeding. Mr. Justice Van Devanter speaking for the Court said (265 U. S. at 391–392):

> The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the

> principal one—and given opportunity to defend his direction and regulations.

From the *Rutter* decision it is clear that the superior was an indispensable party in a suit brought against a subordinate which attacked as invalid an order issued by the superior upon the ground that the superior had abused his discretion *within the scope of authority* conferred upon him by a valid statute.

In *Williams* v. *Fanning,* the Postmaster General after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order directing the respondent, the postmaster at Los Angeles, where petitioners do business, to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all matter directed to petitioners, and to return it to the senders. Petitioners sued the local postmaster to enjoin him from carrying out the order. Motion to dismiss, made on the ground that the Postmaster General was an indispensable party, was granted by the lower courts. The Supreme Court reversed, and held that the motion to dismiss should be overruled. Speaking of *Guerich* v. *Rutter,* and related cases, the Court said (p. 493):

> These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require *him* to take action, either by exercising directly a power lodged in him or by having

> a subordinate exercise it for him. [Italics added.]

The Court then compared the facts and principles in those cases with the facts and principle laid down in *Colorado* v. *Toll,* 268 U. S. 228, and at the same time, stressed the fact that there was no conflict between these two lines of cases, since the *Toll* case involved a situation where "relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain, or *interfere* with the *public administration.' Land* v. *Dollar,* 330 U. S. 731, 738." [Italics added.]

The Supreme Court went on to say that the decree in the case before it was like the decree in the *Toll* case, since it will "effectively grant the relief desired by expending itself on the subordinate official who is before the Court." The Court declared that it was the local postmaster *alone* "Who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders." Thus, as the Court further pointed out, if the local postmaster "desists in those acts, the matter is at an end. That is all the relief which petitioners seek." Comparing the case before it and the facts in the *Rutter* and related cases, the Court concluded as follows (p. 494):

> The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as

> in the *Rutter* case. *No concurrence on his part is necessary* to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. [Italics added.]

When these principles are applied to the facts in the instant case, it becomes clear that the *Rutter* and related cases should control, rather than the *Toll* case.

Here it is not the Area Rent Director who refuses to terminate rent controls in the City of Los Angeles. The Act does not confer that power upon him. Thus, if he desists, the matter is not at an end because the Housing Expediter must still terminate rent controls in the City as the Act requires, if appellants are to obtain the relief which they seek. Hence, if relief is granted bringing to an end the administration and enforcement of such control in the City of Los Angeles it would require the Housing Expediter "to take action, * * * by exercising directly a power lodged in him" and which is not lodged in anyone else.

In other cases where the facts were far less compelling for the application of the rule respecting indispensable parties than are the facts present in the instant case, both Courts of Appeals and lower courts have not hesitated to hold that the Housing Expediter is an indispensable party upon the basis of the *Fanning, Rutter,* and other related cases.

In *May* v. *Maurer* (C. A. 10th), No. 4082, Sept. Term 1950, an action was brought against Maurer, an area rent director, for an injunction and declaratory

judgment. The plaintiff prayed for judicial determination that her premises were not subject to rent control by the rent director and for injunctive relief restraining the area rent director from issuing an order fixing rent ceilings for the premises. Holding that the Expediter was an indispensable party to the action, the Tenth Circuit Court, speaking through its Chief Judge Phillips, said the following:

> Here, in so far as May sought injunctive relief against the issuing or enforcement of an order by Maurer reducing the rent, an injunctive order would expend itself on Maurer, the subordinate official, and an action for that relief could be maintained without joining the Housing Expediter as a party defendant; however, that relief was only incidental to the main relief sought, which was a decree adjudicating that the leased premises were not subject to rent control and permanently enjoining the issuance of orders subjecting such premises to rent control. A decree could not effectively grant such principal relief unless it bound the Housing Expediter, and such a decree, if binding on the Housing Expediter, would interfere with the public administration of rent control. An action for such principal relief could not be maintained without joining the Housing Expediter as a party.

Another case in point is *Berlinsky* v. *Woods,* 178 F. 2d 265 (C. A. 4th) certiorari denied, 70 S. Ct. 805. There the plaintiff brought suit against the Housing Expediter, and Area Rent Director to compel these

defendants to recognize certain property as housing accommodations and to take steps to prevent plaintiff's eviction. In ruling that the Expediter was an indispensable party to the action, the court said, p. 267:

> Since the power to administer the Housing and Rent Control Act of 1947, as amended, was lodged in the Housing Expediter under Sections 204 and 206, 50 U. S. C. A. Appendix, §§ 1894, 1896, and the purpose of the suit is to require him to take action in the exercise of his statutory powers, he is an indispensable party to the suit which cannot go on without him; and the case must therefore also be dismissed as to the Area Rent Director and the Sheriff of Baltimore City. *Jacobs* v. *Office of Housing Expediter,* 7 Cir., 176 F. 2d 338; *Williams* v. *Fanning,* 332 U. S. 490, 493, 68 S. Ct. 188, 92 L. Ed. 95.

In *Smart* v. *Woods, supra,* action was brought by a landlord against an Area Rent Director for an injunction against enforcement of an order issued by the Housing Expediter denying an appeal from an order of the Area Rent Director which established a maximum rent for the plaintiff's accommodations. The Sixth Circuit Court affirmed an order dismissing the complaint upon the ground that the Housing Expediter was an indispensable party.

In *Jacobs* v. *Abern, supra,* action was brought by a landlord against the Area Rent Director praying for a declaratory judgment that he is entitled to a 6% return on his investment. The Seventh Circuit Court affirmed a ruling that the Housing Expediter was an

indispensable party.[6] Based upon these decisions, the relief sought and the circumstances present in this case, there can be little question but that the Housing Expediter is an indispensable party here.

There remains for consideration the authorities relied on by appellants. These are *Williams* v. *Fanning, supra, Koepke* v. *Fontecchio,* 177 F. 2d 125 (C. A. 9th) and *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86.

Consideration of *Williams* v. *Fanning, supra,* shows that under it, the Housing Expediter is an indispensable party. *Koepke* v. *Fontecchio,* 177 F. 2d 125 (C. A. 9th) and *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, are clearly distinguishable from the facts present in the instant case

The *Fanning* case, as shown above, far from supporting appellants' contention, has been consistently construed as holding that the Housing Expediter is an indispensable party under facts even less persuasive than those involved here. As the court below held, the *Fanning* case controls the instant case because the

[6] Other rulings in accord with the decisions cited above and holding the Expediter to be an indispensable party are the following: *Mitchell* v. *Bowles*, 4 O. P. A. Op. & Dec. 5161, 5163 (S. D. Cal.); *McKinley Crain* v. *Rose et al.* (E. D. Wis.), No. 4785, August 23, 1949 (three-judge court); *Prince* v. *United States* (S. D. N. Y.), No. 48–327; *Bayshore Royal Hotel Corp.* v. *Avirett* (S. D. Fla.), No. 1456; *Harper* v. *Heilman* (S. D. Ill.), No. P–1036; *Berkshire Apartment Co.* v. *Woods* (D. C. Mo.), No. 4892; *Thalgo Corp.* v. *United States* (N. D. Ohio), No. 26487; *M. H. Management Corp.* v. *Woods*, (E. D. N. Y.) C. A. 10441.

See, too, under other Acts, *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1009 (S. D. Cal. C. D.); *American Communications Assn.* v. *Schauffler*, 80 F. Supp. 400 (E. D. Pa.) (three-judge court); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Beckman* v. *Mall et al.*, 48 F. Supp. 853 (three-judge court; Phillips, Huxman, Circuit Judges, and Hopkins, District Judge); *Neher* v. *Harwood*, 128 F. 2d 846 (C. A. 9th).

decree, if granted, would require the Expediter "to take action, either by exercising a power lodged in him or by having a subordinate exercise it for him * * *. Since there was discretion to be exercised by Tighe Woods, the *Fanning* case is applicable to our problem here." Moreover, the facts of the instant case involve the precise situation contemplated by the *Fanning* case where relief, if granted against the subordinate is bound to "interfere with the public administration" of an Act to prevent inflationary rents in a period of grave emergency.

The complaint in the *Fontecchio* case alleged that on March 19, 1947, the plaintiff proposed to convert certain housing accommodations into motor courts and, therefore, were occupied and utilized as motor courts. At the time that these premises were occupied and utilized as motor courts, there was in full force and effect the Housing and Rent Act of 1947, effective on July 1, 1947, which provided in Section 204 (e) (2):

> (c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include * * *
>
> (2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof.

Shortly after the enactment of the Housing and Rent Act of 1947, the Housing Expediter, through the General Counsel, issued an interpretation with respect to motor courts. He held in substance that in order that the property may be decontrolled as a

motor court, it must have been a motor court on June 30, 1947, and such interpretation was incorporated into the Controlled Housing Rent Regulation which thereby established June 30, 1947, as the test date for decontrol of motor courts.

The action was brought against the Area Rent Director for negative injunctive relief to restrain the Area Rent Director from fixing maximum rentals for the particular premises owned by the plaintiffs. The Court upon a Motion for Summary Judgment by the defendant held that the Housing Expediter was without any power and authority to issue a regulation setting June 30, 1947, as the test date of what would constitute a motor court, because *on its face the statute exempted motor courts without regard to time limitations.* The action of the lower court was affirmed by this Court. The Court held that it was unnecessary to join the Housing Expediter in a suit to enjoin the Area Rent Director where the latter's action was *ultra vires* the statute.

The *Fontecchio* case is not in point for several reasons:

1. From the face of the statute the Housing Expediter was found to be acting without authority, while here, from the face of the statute, authority to terminate controls is expressly vested in the Housing Expediter;

2. Fontecchio sought an injunction to prevent the Area Rent Director from establishing maximum rentals upon his own properties, while here plaintiffs seek a city-wide injunction which brings all rent

enforcement and administration in the City of Los Angeles to a complete halt;

3. Fontecchio's property was always exempt from the time of the enactment of the Act, while the plaintiffs' property in this case has always been under control, and in construing the statute, doubt, if any, must be resolved against the person seeking to avail himself of the exemption.[7]

Hynes v. *Grimes Packing Co.,* 337 U. S. 86, is distinguishable upon similar grounds. In that case, an action was brought by the Hynes Packing Company and several other companies which were engaged in the commerce of fishing in Alaska to enjoin the regional director of the Secretary of the Interior from enforcing a federal regulation which prohibited commercial fishing in the waters of the Karluk reservation in Alaska. One of the questions present in that case was whether the Secretary of the Interior was an indispensable party to the action. This Court affirmed a judgment granting injunctive relief, and held that the Secretary of the Interior was "without any authority whatsoever" to exclude the plaintiffs from fishing in the Karluk Salmon run. (See, 165 F. 2d 323.) Since "*all* power" to act was absent, it was not a case where it could be said that the Secretary was not merely abusing his discretion and hence he was not required to be joined. This Court referred to its prior decision in *Neher* v. *Harwood,* 128 F. 2d 846,

[7] *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 350; *Reynolds* v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863 (C. A. 9th); *McCauley* v. *Makoh Indian Tribe,* 128 F. 2d 867 (C. A. 9th).

849 (C. A. 9th) cert. denied, 317 U. S. 659, where all the leading cases were carefully analyzed into two categories.

> In the two former cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner *abused his discretion* and in such circumstance it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was *without authority to act at all* in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint. [Emphasis supplied.]

Pointing out that in the case before it the Secretary was held to have *no authority at all* to issue the regulation, this Court held that the facts of the case brought it within *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, in which it was held that the Secretary of War who was without authority to make a regulation, was not an indispensable party. The decision of this Court in the *Hynes* case was affirmed upon appeal, 337 U. S. 86. The Supreme Court said the following on this point (p. 86):

> At the outset the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams* v. *Fanning,* 332 U. S. 490, the test as to whether a superior official can be dispensed with as a party was stated to be

> whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." P. 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

The Supreme Court likewise agreed with this Court's ruling that the Secretary of the Interior was without authority to act at all (337 U. S. at p. 123).

Unlike the *Grimes* case, where the Secretary of Interior was "without any authority whatsoever" to act, and the *Fontecchio* case where the Housing Expediter also lacked authority to act, the statute in the instant case expressly confers upon the Housing Expediter authority to act, since it empowers him "to terminate rent control."

There are other reasons why the *Fontecchio* and *Grimes* cases are not in any respect controlling here, and why the Housing Expediter is an indispensable party under the *Fanning* case *supra*.

1. The functions which appellants are seeking to restrain, embracing as they do the enforcement and administration of rent control in the entire City of

Los Angeles, are functions which can be exercised only by the Housing Expediter and not by any of his subordinates such as an area rent director. This is, therefore, not the kind of case in which a decree if entered, would expend itself in a subordinate official who is before the Court. The subordinate official never had, and does not have, the power to decontrol the *entire* City of Los Angeles. The subordinate official does not have, and never had, the authority to refrain from administering rent control in the *entire* City of Los Angeles. While he has the power to issue individual rent orders respecting specific properties based upon information respecting those specific properties, any attempt by the area rent director to cease administering rent control in the City of Los Angeles would be an act directly contrary to his authority and would bring about his summary discharge.

2. The decree sought in this case would also attempt to restrain the area rent director from enforcing the act. However, the area rent director has no powers of enforcement whatsoever. These powers of enforcement are lodged in the United States by Sections 205 and 206 of the Act (*infra,* p. 70) and in turn delegated by the Attorney General to the Housing Expediter (14 F. R. 6097) (Section 206 (e) *infra,* p. 71). The staff of litigation attorneys in Los Angeles discharging enforcement powers are directly responsible to the General Counsel of the Office of the Housing Expediter in Washington, D. C. They are not subject in any way, shape or manner to the control or direction of the Area Rent Director, whose functions are of an

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administrative character only (12 F. R. 6908, incorporating, 12 F. R. 1143, 12 F. R. 2986).

Thus, if the decree were entered in this case restraining both the administration and enforcement of rent control in Los Angeles, it would not expend itself on a subordinate official who is before the Court since he lacks authority to exercise the powers which the decree seeks to restrain. Rent controls would still be in effect in the city even if the Area Rent Director were restrained from discharging his duties. If the explicit direction of the statute itself is to be observed for controls to end, further affirmative action would still be required by the Housing Expediter to terminate controls in the City of Los Angeles. Thus too, if the Area Rent Director ceased issuing orders of adjustments as the complaint requests, an absurd and chaotic situation would result. Landlords would be subject to the burdens of rent controls in the form of maximum rents established by the existing Act, but would be barred from obtaining the benefits in the form of adjustments increasing rentals. In no event would the decree expend itself on the Area Rent Director. Concurrence on the part of the Housing Expediter would still be necessary to make decontrol effective and enforcement ineffective, unlike the *Fanning* case where no concurrence was required on the part of the Postmaster General. In addition, the restraint sought by appellants would clearly interfere with the public administration of the law since it would paralyze the administration and enforcement of rent control in the large City of Los Angeles and prohibit the Housing Expediter from carrying out the

duties imposed upon him by Congress. Hence, the issues of the suit cannot be settled in this case by a decree between the plaintiffs and the Area Rent Director without having the Housing Expediter as a party to the litigation.

Consideration of appellants' contention that the duties performed by the Expediter under Section 204 (j) (3) are ministerial and hence the action of the Area Rent Director is ultra vires the statute

Appellants claim that the *Fontecchio* case applies here so far as the action against Koepke is concerned, because the duties to be performed by the Expediter under Section 204 (j) (3) are ministerial only; that therefore his failure to terminate controls in Los Angeles after receipt of the resolution from the City Commission was an act beyond his statutory authority; and hence, any action by the Area Rent Director in Los Angeles for enforcing or administering the Act would likewise be *ultra vires.*

In the first place, if the duties to be performed under Section 204 (j) (3) of the Act are indeed ministerial, as claimed, there is an ample remedy, and that is to sue in the Federal District Court of the District of Columbia for mandamus. (See *United States* v. *Tacoma Oriental S. S. Co.,* 86 F. 2d 363, 368 (C. A. 9th).)

Secondly, in determining whether the Housing Expediter's functions under Section 204 (j) (3) are ministerial, it should be noted that the test is whether his duty is "so plainly prescribed as to be free from doubt and equivalent to a positive command" (Judge Albert Lee Stephens sitting by designation and speaking for the Court in *Thomas* v. *Vinson,* 153 F. 2d 636 (App.

D. C.). As in the *Vinson* case, *supra,* where the Court rejected plaintiff's claim that the duties of the government official were ministerial, here, too, it will be demonstrated that there is "nothing in the Acts themselves or in the facts surrounding their adoption which indicates with certainty the meaning to be placed upon them. They do not prescribe a plain, understandable, and definite ministerial duty" (*Thomas* v. *Vinson, supra*). And this conclusion also finds full support in the decision of the Appellate Court of the District of Columbia in *Babcock* v. *Woods, supra,* where the Court said:

> A determination by the Expediter as to whether a resolution received by him was adopted in accordance with local law is the sort of determination which executive officials must make constantly in the administration of laws enacted by Congress.

It must therefore be manifest from a reading of the Act that the court below was right in holding that the Expediter is not merely a "highly paid clerk" or "a glorified push button." As the Court below said:

> * * * The statute says that "the Housing Expediter shall terminate the provisions of this title in any incorporated city upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage," and so forth.

> It seems to me clear that Congress could have eliminated those matters which are now here for discussion. It could have said that the Expediter shall terminate upon receipt of a resolution by the governing body of any city that there no longer exists such shortage in rental housing accommodations.
>
> That the Congress didn't do. They put in certain other provisions there, and it seems to me that the Housing Expediter has to determine whether this was in accordance with applicable local law.

To adopt the review that the Housing Expediter is a mere "rubber stamp" would mean that there would be no check whatever upon a local governing body to determine whether its resolution is in accordance with applicable local law. No matter how lacking in compliance with local law a resolution for decontrol was or indeed no matter how contrary it was to local law, it would nevertheless become effective, once it reached the hands of the Expediter.

This is a difficult theory to accept when we remember that the Act provides no method of recontrolling cities that have been decontrolled under Section 204 (j) (3). Hence, once decontrol action is taken under Section 204 (j) (3), it is an irretrievable course of conduct from which there is now no recall. It seems more reasonable to conclude that had Congress intended to withdraw all discretion from the Expediter, it would have been easy to do so by express language to that effect. It could, for example, have refrained from requiring that the Housing Expediter shall

terminate controls, as it did. It could have simply said, controls shall end in a city when the local governing body adopts a resolution for that purpose. Instead, Congress took pains to include the requirement that the Expediter "shall terminate" and the others for notice, public hearing in Section 204 (j) (3), and compliance with applicable local law. Unless we are to impute to Congress an intention to include in the Act meaningless words, it is difficult to escape the conclusion that Congress desired the Housing Expediter to exercise such discretion as was necessary for effectuating the purposes of the Act.

Consideration of appellants' argument that the word "shall" in Section 204 (j) (3) deprives the Housing Expediter of discretion

The appellants stress the argument that the word "shall" in Section 204 (j) (3) imposes an absolute mandate upon the Housing Expediter to terminate controls. There is no merit to this contention.

Use of the word "shall" in connection with a predecessor statute, the Emergency Price Control Act (50 U. S. C. App. 905 (a)), was considered by the Supreme Court in *Hecht Co.* v. *Bowles,* 321 U. S. 321. Section 205 (a) of that Act provided that injunctive relief "shall be granted" upon a showing of violation and application of the Administrator to restrain violation (*infra,* p. 71). It was there contended that the language so employed deprived the court of any discretion, and once violation was established, injunctive relief was mandatory in view of both the language used and its legislative history. Nevertheless, the Supreme Court rejected this contention,

holding that the mandatory language used did not deprive the Court of the sound discretion traditionally exercised by it, and that had Congress intended such a drastic departure it would have used an unequivocal statement to that effect (321 U. S. at 329). So too, if Congress had intended to withdraw from the Housing Expediter the usual discretionary powers traditionally exercised by an Administrator of an Act of Congress, and especially those powers which are so essential for carrying out the purposes of Congress, it would have used plainer and more appropriate language than it did to accomplish that result.

There are many other instances where the word "shall" has been construed as being merely directory rather than mandatory, particularly where such a construction involves prospective action by government officials and if the law's purpose is the protection of the public interest by guidance of government officials. Citation of merely a few other cases will illustrate this point. Thus, in *Erhardt* v. *Schroeder,* 155 U. S. 124, a statute was held merely to be a guide to public officers which provided, in language apparently mandatory, that the collector of the port of New York "shall" examine at least a certain proportion of shipments sent to him for examination and appraisal; and an assessment based on inspection of less than the prescribed percentage was therefore upheld.

As was said by this Court in *Rosenberg* v. *McLaughlin,* 66 F. 2d 271, 272 (C. A. 9th):

> The use of the word "shall," upon which great stress is laid by appellants, is not mandatory

and does not confine the collector to a single method of procedure.

Consideration of other provisions in Section 204 indicate that Congress intended to confer discretion upon the Expediter in discharing the functions under Section 204 (j) (3)

Reference to other provisions of the Act likewise suggests Congressional intent to place reliance upon discretionary action by the Housing Expediter. For example, under Sections 204 (j) (1) and (2) of the Act, (*infra,* p. 69), the Housing Expediter is required merely to make a public announcement to the effect that he has been advised by the Governor of a State of provision for State rent control (j) (1) or by the State that Federal rent control is no longer necessary (j) (2). Thereupon, rent controls in any such State become terminated. It becomes pertinent to inquire why the Congress was willing to risk the removal of Federal rent control in an entire State without permitting any degree of control in the Housing Expediter, but was unwilling to employ the same technique in the case of a unit of the State. Certainly, it is not unreasonable to conclude that the imposition of specific requirements and affirmative action by the Housing Expediter were imposed in order that some degree of substantial authority be vested in a governmental agency when the decontrol of municipalities was involved. Such an assumption would give reasonable meaning to the framework of the Act, when a contrary interpretation would suggest meaningless gestures by the Congress and the lowest form of clerical function by the Housing Expediter.

Examination of Section 204 (f) (1) (A) (50 U. S. C. App. 1894 (f) (1) (A)) also provides significant legislative comparison when viewed against the background of Section 204 (j) (3) (*infra,* p. 68). It is there provided that any incorporated community may declare "by resolution of its governing body adopted for that purpose, or by popular referendum, in accordance with local law" that a rental housing shortage exists, requiring continued control. Upon passage of such a resolution, Federal rent control is automatically extended for an additional six-month period. It will be observed that although the governing body would be dealing with the same subject matter and through the same designated method, i. e., "resolution," it merely "declares" by resolution that a shortage exists, none of the procedural requisites are imposed, and no participation by the Housing Expediter in the acceptance of the resolution is authorized by the Act.

Consideration of provision that resolution must be adopted in accordance with applicable local law

Additional inquiry also must be directed to the requirement that the resolution be "adopted for that purpose in accordance with applicable local law." As was held in *Babcock* v. *Woods, supra,* the right of inquiry and decision, with a necessary exercise of discretion, must be accorded before the validity of the action may be assumed. We are not here dealing simply with the word "resolution" in a vacuum. The resolution called for must meet the requirements of local law. To determine such compliance requires

consideration of the governing charter. Upon such consideration, it is found that Section 21 of the Los Angeles Charter provides that "all legislative power of the City * * * shall be exercised by ordinance * * *." Under Section 281 of the Los Angeles Charter, "no ordinance, legislative, administrative or executive, passed by the Council shall go into effect until the expiration of thirty days from its publication." Since the Los Angeles Charter speaks of "administrative or executive" ordinances, it is questionable whether the action of the City Council in dealing with rent control at least does not have the dignity of an "administrative or executive" ordinance. Initiative and referendum provisions usually apply to "matters of legislation affecting the entire city, and of a character likely to engage the attention and arouse the favor or opposition of every voter," *Hopping* v. *City of Richmond,* 170 Cal. 605, 150 Pac. 977, 981. If the public hearing is to be viewed as a legislative hearing, then greater reason is present to assume that a legislative act results.

While appellants assert that by using the word "resolution" Congress could not possibly have intended an action taken and clothed with the dignity of an "ordinance," the problem is not at all susceptible to such an "open and shut" construction.

We must bear in mind that a "joint resolution" of Congress has the full force and effect of law, and constitutes as binding a legislative enactment as one adopted by more usual procedures. Then too, Congress used the words "resolution in accordance with applicable law," and the term "resolution" is not a

term with a fixed or absolute meaning in law. It has been used interchangeably with such words as "ordinance," "order," "measure," and action." (See Vol. 30, Words & Phrases (Perm. Ed.), pp. 146, 152–153; Vol. 37, Ibid., pp. 408–414.)

Let us assume that the City Charter of Los Angeles required matters relating to rent control or decontrol to be dealt with by ordinance only, and expressly barred the use of a resolution for that purpose. If, in face of this explicit restriction, the City Council nevertheless adopted a resolution for the end of rent control, would the Housing Expediter be obliged to accept it and terminate controls, even though it was clear that the resolution was not "in accordance with applicable law"? The answer is that he must nevertheless do so, if we accept appellants' contentions as valid.

It is little wonder that the Appellate Court for the District of Columbia made short shrift of the decision of the lower court in *Babcock* v. *Woods, supra,* and directed dismissal of the complaint filed against the Housing Expediter for a mandatory injunction compelling the latter to terminate controls in the City of Los Angeles. In reversing the court below, the Appellate Court for the District of Columbia declared that action taken by the City of Los Angeles, pursuant to 204 (j) (3) was a *legislative act* which required an ordinance and all of the formalities attending it, and that the resolution adopted by it was invalid to terminate controls in the City of Los Angeles. As the Appellate Court observed, determination as to whether the resolution is in accordance with applicable local

law is not uncommon, but rather one which "executive officials must make constantly in the administration of laws enacted by Congress."

In addition, there are other aspects of Section 204 (j) (3) which unmistakably indicate that the duties of the Housing Expediter involve discretion and are in no sense ministerial.

Consideration of provisions for notice, public hearing and finding that no shortage of housing exists

Let us assume for a moment that there was no notice as required by the statute at all but that the local governing body certified it had given notice. Could it be denied that upon being advised of lack of notice, that the Housing Expediter lacked discretion to refuse to terminate controls? Let us assume for a moment that notice was given, but there was no public hearing. Could it be denied that the Housing Expediter upon being advised of the lack of public hearing, would be obliged nevertheless to end controls? Let us assume that at the hearing, all the evidence which was adduced demonstrated that there was still a vital need for rent controls and that there were no vacancies at all. Would the Housing Expediter be obliged to accept as valid a resolution that "there no longer exists such a shortage in rental housing accommodations as to require rent control in such city" when there was not a shred of evidence to support it? Surely, this would not be a finding "reached as a result of a public hearing" if it had no evidence whatever to support it. Yet, if we accept as sound, appellants' contention that the Housing Expediter

has no discretion whatever under Section 204 (j) (3) and that he is just a "rubber stamp," a resolution must be given effect regardless of whether the requirements of the Act have been satisfied or not, so long as the resolution is adopted and sent.

Thus, too, if a city council chose a place for hearing so small that no members other than themselves would be accommodated, no one would argue that a public hearing, in any sense, had been had. Yet, who is to make the inquiry and to judge the result if a city council nevertheless certifies that a public hearing was held? Or suppose that only predetermined spokesmen favoring decontrol are permitted to participate in a hearing, must the Housing Expediter, being informed of the true circumstances, blindly impose the tragedy of inflation upon tenants? If it can be agreed that in "extreme" cases, a right of investigation and decision exists, then discretion is necessarily present. Whatever may be the degree of discretion to be exercised, if it is called into play at all, the right of the Executive branch of the Government to dispose of controversial matters entrusted to its charge becomes removed from the jurisdiction of the courts.

The requirement as to findings *reached as the result of a public hearing* perhaps more forcefully illustrates the element of discretion involved in proceedings under Section 204 (j) (3).

Unless these local option provisions of the statute are to be so construed as to be capable of perpetrating a monstrous fraud upon those entitled to the protection of the Act, it is difficult to understand why the re-

sponsible Government officer to whom the Congress has entrusted the administration of Federal rent control cannot determine whether there was *any* evidence to support the findings. Obviously, findings are not reached as a result of public hearing when the public hearing is barren of *all* evidentiary basis.

Consideration of appellants' arguments based upon the legislative history of the Act

Appellants present extended argument, based upon the legislative history, in an effort to demonstrate that the Housing Expediter was vested only with the mechanical function of accepting without question a resolution under Section 204 (j) (3). Particular emphasis is placed upon an excerpt from the Senate report on the 1950 Act (S. Rep. 1780, 81st Cong., 2d Sess., on S. 3181)—and a similar statement in the House report—that "the action of the local governing body would be final and not subject to review, appeal or change by any other authority" (p. 10). In discerning the real intent of this statement, however, it is necessary to recall that under the 1949 Act, any such resolution of a local governing body was required to be forwarded to the Governor, and that official could nullify the action by veto or simply by inaction, since only he could forward the resolution to the Housing Expediter. In speaking of the 1949 and 1950 provisions of Section 204 (j) (3), the Report advised that "these provisions for decontrol would be continued with one modification, namely, that in the case of decontrol action by a governing body of an incorporated city, town, or village it would not be neces-

sary that the Governor of the State approve the resolution requesting the Housing Expediter to decontrol the community" (pp. 9–10). Then follows the sentence hereinbefore quoted as to the finality of the local body's action. When these two sentences are read together, as they must be, it becomes fully apparent that the elimination of the Governor's approval constituted the "one modification" of the 1949 provisions, and that the finality of action refers to the removal of the internal arrangement whereby a local governing body's action was subject to absolute review by the Governor. It should not be construed so as to foreclose the Housing Expediter's authority to require observance with applicable local law, as well as with the federal rent law.

In any event, the Court lacks jurisdiction to restrain the Area Rent Director from enforcing the Act since the latter has no enforcement powers whatever

It has already been observed that the Area Rent Director has no enforcement powers to restrain unlawful eviction proceedings or to sue for overcharges. It should also be noted at this point that the complaint contains no allegations that the Area Rent Director has any power to institute civil proceedings against anyone or that he is even threatening to do so. The complaint is wholly defective in this respect. Significantly, not even in the brief submitted by appellants do they claim that the Area Rent Director has any enforcement powers. At page 9 of their brief, appellants state that the Area Rent Director's office "possesses and handles complaints" of tenants upon the basis of which actions are instituted against

persons in the City of Los Angeles. Appellants also state that the area rent office issues orders reducing and fixing rents. But nowhere in the brief just as nowhere in the complaint do appellants claim that the Area Rent Director has any power to institute action for enforcement or that he has any control over the enforcement powers exercised by the litigation office in Los Angeles. In these circumstances, the authorities are clear that there is no equity jurisdiction to grant injunctive relief against the Area Rent Director restraining the latter from enforcing the Act. *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160; *Whitehead* v. *Cheves,* 67 F. (2d) 316 (C. C. A. 5th); *Yarnell* v. *Hillsborough Packing Co.,* 70 F. (2d) 435 (C. C. A. 5th); *City of Osceola* v. *Utilities Holding Corp.,* 55 F. (2d) 155, 158 (C. C. A. 8th); *Grand Trunk Western Ry. Co.* v. *Curry,* 162 Fed. 978, 982–983 (C. C. N. D., Cal.); *Bookbinders' Trade Ass'n* v. *Book Manufacturers' Institute,* 7 F. Supp. 847, 848 (S. D. N. Y.); *James* v. *Lake Wales Citrus Growers Ass'n,* 110 F. 2d 653 (C. A. 5).

The *Claire Furnace Co.* case, *supra,* is an apt illustration of this rule. That was a suit in the Supreme Court of the District of Columbia by a number of companies engaged in the coal, steel, and related industries to enjoin the Commission from enforcing or attempting to enforce certain orders issued by it against the complainants, requiring them to furnish certain reports. An injunction was granted as prayed. The judgment was affirmed by the Court of Appeals for the District of Columbia. The Supreme Court, however, reversed the judgment and remanded

the case to the trial court with directions to dismiss the complaint upon the following grounds, saying (274 U. S. at p. 173):

> *There was nothing which the Commission could have done to secure enforcement of the challenged orders* except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, *the trial court should have refused to entertain the bill in equity for an injunction.* [Italics supplied.]

In the *Yarnell* case, *supra,* the Fifth Circuit held that the district court was without jurisdiction to enjoin the Control Committee created in accordance with a marketing agreement under the Agricultural Adjustment Act from enforcing the Act, since it had no power to carry out its threats to enforce its orders (p. 439):

> *As the committee has no power, and so far as appears has not assumed and will not undertake to enforce either its prorate orders or its alleged threats, injunction does not lie against it. Pennsylvania R. R. Co.* v. *Labor Board,* 261 U. S. 72, 85, 43 S. Ct. 278, 67 L. Ed. 536. [Italics supplied.]

In *Janes* v. *Lake Wales Citrus Growers Ass'n,* 110 F. 2d 653, the District Court had granted an injunction against enforcement of the Fair Labor Standards

Act and for declaratory judgment that petitioners were exempt from the act. The injunction restrained an inspector of the Wage and Hour Division of the Fair Labor Standards Act and also a United States attorney for the Southern District of Florida. Upon appeal, the Fifth Circuit reversed and in an opinion for the court by Judge Sibley said the following:

> We are of opinion that the injunction should have been refused and the motions to dismiss granted. The evidence showed that the Administrator was preparing to enforce the act throughout the country, but that the Inspector was only an investigator, and had no power to institute suits or prosecutions.
>
> * * * * *
>
> If they wish a test in equity they ought to go to a jurisdiction where more responsible parties can be found.

From the foregoing, it must be manifest that Judge Carter was right in holding that Section 204 (j) (3) of the Act conferred upon the Housing Expediter discretionary powers which could not be controlled by the courts. Viewed most favorably to appellants, it may be said that the statute is not free from doubt. But even if this be so, there is brought into play the familiar rule that decisions of administrative officers which are based upon statutes which are not free from doubt, involve an exercise of discretion. Insofar as an administrative determination based on the exercise of such discretion is not unreasonable or plainly wrong, the courts will not interfere either by injunction or mandamus. *Decatur* v. *Paulding,* 14 Peters 497; *Hall* v. *Payne,* 254 U. S. 343; *Ness* v. *Fisher,* 223

U. S. 683; *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426; *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604; *United States* v. *Ickes*, 98 F. 2d 271 (App. D. C.), cert. denied 305 U. S. 619; *Brunswick* v. *Elliott*, 103 F. 2d 746 (App. D. C.); *Reichelderfer* v. *Johnson*, 72 F. 2d 552 (App. D. C.); *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Wilbur* v. *United States*, 281 U. S. 206; *Adams* v. *Nagle*, 303 U. S. 532; *White* v. *Coe*, 95 F. 2d 347 (App. D. C.).

In no respect can this case be said to fall within the test laid down in *Thomas* v. *Vinson*, supra, that the Act directs "a plain, understandable and definite ministerial duty" or that it is "so plainly prescribed as to be free from doubt and equivalent to a positive command (153 F. 2d at p. 639).

Since the court below lacked jurisdiction over the Housing Expediter and since he is an indispensable party to the action, the court below properly dismissed the action against the Area Rent Director and other defendants.

III

The judgment below should be affirmed because the action is in effect one against the United States which has not consented thereto

This action must be dismissed as a suit against the United States which cannot be sued without its consent. "No principle is better established than that the United States may not be sued in the courts of this country without its consent * * *. That the United States is not named on the record as a party is true. But the question whether it is in legal effect

a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can be rendered." *Louisiana* v. *McAdoo,* 234 U. S. 627, 628, 629. See also, *Transcontinental & Western Air* v. *Farley,* 71 F. 2d 288, 290 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

Any judgment or decree which can be rendered restraining enforcement of the act in this case will plainly effect the rights of the United States. Section 205 of the act expressly confers upon the United States the right to sue for statutory damages (infra, p. 70). Section 206 (b) of the act expressly confers upon the United States the right to sue for injunctive relief which includes the right to restrain unlawful evictions (*infra,* p. 70). Thus, all of the enforcement powers under the act are vested in the United States and any action which seeks an interference with those powers is of necessity an action against the United States.

It has long been recognized that the sovereign's immunity from suit extends to attempts to interfere with its institution of litigation. *Hill* v. *United States,* 9 How. 386; *United States* v. *McLomore,* 4 How. 286. Directly applicable here is the holding of the Supreme Court in the case of *In re Ayers,* 123 U. S. 443. There suit was brought to prevent actions by State officials to recover taxes. In holding the suit not maintainable because it was in effect one against the State, the Court said (p. 497): "The acts sought to be restrained are the bringing of suits by the State of Virginia in

its own name and for its own use." Furthermore, as a matter of substance even prior to the inclusion of the provisions of the act referred to above, which conferred the right to sue upon the United States, this Court and other courts considered actions for enforcement under the act as one brought by the United States even though the nominal plaintiff was formerly the Price Administrator and his successor. Cf. *United States* v. *Koike,* 164 F. 2d 155 (C. A. 9th); *Fleming* v. *Findlay,* 165 F. 2d 79 (C. A. 9th); *Fleming* v. *Goodwin,* 165 F. 2d 334 (C. A. 8th).

In addition, the grave need for the continuation of rent control was made clear by Congress in its declaration of policy under Section 201 (b) of the Act, when it declared that it "recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas." With this vital public welfare at stake, it is plain that the Government is the real party in interest and the attempt made here to prevent Government officials from discharging their statutory responsibilities is in reality a suit against the United States.

This conclusion is thoroughly supported by controlling decisions of the Supreme Court and lower courts. *Naganab* v. *Hitchcock,* 202 U. S. 473; *Wells*

v. *Roper,* 246 U. S. 335; *United States* v. *Griffin,* 303 U. S. 226;[8] *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371; *Goldberg* v. *Daniels,* 231 U. S. 218.

Even though the action in this case is against officers or agents of the United States, it is not one to enjoin individual action contrary to law, but rather a suit to restrain an officer of the Government in performance of his official duties from enforcing the Act and, therefore, it is an action against the United States. *Larson* v. *Domestic & Foreign Commerce Corporation,* 337 U. S. 682; *Miller* v. *Woods,* No. A30–554 (Mun. Ct. D. C.). As was said by Chief Judge Barse in *Miller* v. *Woods* where the tenants sued the Housing Expediter to restrain him from terminating controls in Los Angeles:

> The United States must, of course, perform the functions specified under the Housing and Rent Act of 1947, as amended, by and through its officers and agents. There can be no reasonable doubt or question that the Housing Expediter, in performing the duties specified in said Section 204 (j) (3), does so as an officer and agent of the United States in his official capacity as Housing Expediter. It follows

[8] Suit to restrain Secretary of the Interior from carrying out the provisions of the Act of June 27, 1902, controlling the disposition of pine lands ceded by the Indians is, in effect, a suit against the United States (*Naganab* v. *Hitchcock,* 202 U. S. 473).

Suit to enjoin Postmaster General from annulling contract for collecting and delivering mail in Washington, deemed one against the United States (*Wells* v. *Roper,* 246 U. S. 355).

Suit to set aside an order of Interstate Commerce Commission concerning railway mail pay is not primarily one against the Commission, but is primarily against the United States (*United States* v. *Griffin,* 303 U. S. 226).

> that the instant suit against the Housing Expediter, is, in legal effect, a suit against the United States. The United States, as a sovereign had not given its consent to be sued in such matters. This doctrine has been recently considered at some length in an analogous case, *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U. S. 682, 69 S. Ct. Rep. 1457, wherein the foregoing principles are reiterated and affirmed.

In *Goldberg* v. *Daniels,* 231 U. S. 218, the Court had before it the contention similar to that involved here, that the duty to be performed by the government official was ministerial in character. Plaintiff complained that the Secretary of Interior refused to accept the highest bid for a surplus war vessel. The plaintiff argued that "The minute the bids were opened and his proposal or bid was ascertained to be the highest" the requirements of law had been met; that no right to reject bids had been reserved by statute; and that the Secretary could sell only in this manner. The Secretary's defense was that he could accept the bid or not as his discretion dictated. The Court speaking through Mr. Justice Holmes stated that there was an earlier point in logic for decision: "The United States * * * cannot be interfered with behind its back and, as it cannot be made a party, this suit must fall."

This decision was recently followed in the *Larson* case, *supra,* 337 U. S. 682.

It is submitted that this is the clearest kind of case in which the doctrine should be invoked as a jurisdictional bar to the action. While this contention was

not raised in the court below, since it relates to jurisdiction, it may be considered at this time even on the Court's own motion (*United States* v. *Griffin,* 303 U. S. 226; *Clark* v. *Paul Gray Inc.,* 306 U. S. 583, 590). In *United States* v. *Griffin, supra* "jurisdiction was not challenged" below (p. 228) but dismissed by the Supreme Court speaking through Mr. Justice Brandeis upon the ground that "a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States. And the United States can be sued only when authority so to do has been specifically conferred" (pp. 238–239).

IV

Plaintiffs have no standing to sue, or right to judicial review

In the first place, the appellants who sue here as Directors and members of the Small Property Owners League have no standing to sue here. The League does not assert any common or undivided interest in any fund or property. It does not disclose any authorization to sue on behalf of its members or to incur liability for suits brought by it. The League does not allege that it personally has been harmed or aggrieved in any way by the alleged wrongful action of the defendants. It is clear that the League asserts no legal right which has been injured and therefore it has no standing to complain.

An analogous case is *Moffat Tunnel League* v. *United States,* 289 U. S. 113. In that case the com-

plainants, an unincorporated voluntary association, brought suit against the United States, the Interstate Commerce Commission and a railroad to set aside an order of the Commission authorizing the railroad to acquire control of another railroad. The complainant was an association organized for the purpose of assisting in the development of adequate transportation facilities in the counties through which the railroads ran. It purported to represent clubs, towns, and irrigation companies and two counties. Sustaining an order of the District Court dismissing the complaint, the Supreme Court said (pp. 118–119):

> These leagues are not corporations, quasi-corporations, or organized pursuant to or recognized by any law. Neither is a person in law and, unless authorized by statute, they have no capacity to sue. * * * There is no federal statute that purports to give any unincorporated voluntary association standing to bring suit to set aside an order of the Commission. * * * The Act does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for setting aside of an order. But it does require that the petition shall set forth "the facts constituting petitioner's cause of action," and by other provisions shows that for failure so to do the suit shall be dismissed. Id., § 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. * * * Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one.

Still another analogous case is *Joint Anti-Fascist Refugee Committee* v. *Clark,* 177 F. 2d 79 (App. D. C.). This was an appeal from an order of the District Court for the District of Columbia dismissing the complaint of the *Joint Anti-Fascist Refugee Committee* (an unincorporated association alleged to be engaged in raising funds for relief of anti-fascist refugees) against the Attorney General, the chairman of the Loyalty Review Board of the United States Civil Service Commission and other members of the Board. The plaintiff Committee sought a declaratory judgment that Section 9 (a) of the Hatch Act as applied by the Executive Order of the President and the order itself were unconstitutional and that the action of the Attorney General in designating and listing the plaintiff as subversive had caused the Committee loss of reputation, and other irreparable damage. The Committee claimed that the Attorney General had made the designation complained of without a hearing and that the plaintiff had been denied due process of law. In addition to declaratory relief, the plaintiff requested a broad injunction to annul the alleged illegal acts of the Attorney General and the Board. The District Court granted a motion to dismiss upon the ground that the complaint failed to state a justiciable controversy and also that it did not state a claim upon which relief could be granted. The appellate court affirmed the ruling below dismissing the complaint. Among other reasons for sustaining the judgment below, the appellate court adverted to the fact that the Committee could not seek redress in the court for alleged impairment of its

members' constitutional rights, since these rights are personal to the individual members. In this connection the Court said (p. 83):

> If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly. Those rights are personal to the individual members. Cf. *Hague* v. *C. I. O.,* 1939, 307 U. S. 496, 527, 59 S. Ct. 954, 83 L. Ed. 1423; *Northwestern National Life Ins. Co.* v. *Riggs,* 1906, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; *Western Turf Ass'n* v. *Greenberg,* 1907, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520.

A more difficult question presented is whether the plaintiffs, Hess and Westberg, as individuals, have any standing to sue in this case. In determining this question, the test is not whether these individual plaintiffs have sustained a loss or are "aggrieved" or "interested" parties but whether they show a violation of some legally protected right (*United States* v. *Public Utilities Commission,* 151 F. 2d 609, 613; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125). As was said in the last cited case (310 U. S. at p. 125):

> It is now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights

> in the absence of constitutional legislation recognizing it as such. * * * Respondents, to have standing in court, must show an injury or threat to a particular right of *their own,* as distinguished from the *public's* interest in the administration of the law. [Italics ours.]

With these principles in mind, we turn to the complaint. What is the gist of the complaint when analyzed? In sum, it is that the Housing Expediter has failed to discharge his duties under the Act to the public generally. This is not enough upon which appellants may rest their suit in this case. At most, it may possibly be argued that under the circumstances mentioned, the Housing Expediter may be answerable to the city which adopted the resolution of decontrol. However, since the City has not seen fit to sue here, there is no need to reach or decide the question of its capacity to sue at this time.

In addition, it may be seriously questioned whether any of the plaintiffs have any right to judicial review where the Housing Expediter has exceeded his statutory authority under Section 204 (j) (3). The statutory scheme of the Act would appear to be opposed to this view. In the same section of the Act as Section 204 (j), but in a different subsection (Section 204 (e) (1)), provision is made for decontrol of defense rental areas by local advisory boards. Recommendations of these local advisory boards are sent to the Housing Expediter for approval or disapproval. Section 204 (e) further provides that after action has been taken by the Housing Expediter, "any representative group of interested parties or

the local board" may review the recommendation in the Emergency Court of Appeals (*infra,* pp. 65–68).

It may therefore be argued with some force, that since Congress expressly provided a right of judicial review for "interested parties" respecting decontrol dispositions by local boards under Section 204 (e), but was silent respecting judicial review of decontrol action by cities under Section 204 (j) (3), that Congress did not intend to provide judicial review for landlords or tenants in the latter case (cf. *Switchmen's Union* v. *Board,* 320 U. S. 297; *Stark* v. *Wickard,* 321 U. S. 288, 306).

It is significant also to observe, that at no point in the rather extensive debates on the 1949 and 1950 Acts did Congress either make plain that the right to judicial review exists for landlords or tenants where decontrol is proposed under Section 204 (j) (3), or by necessary inference suggest that such authority should be read into the statute. On the contrary, the legislative history of the 1950 Act demonstrates an intention not to provide a right of judicial review for landlords even in those cases where they are deprived of a "fair net operating return" provided for by Section 204 (b) of the Act (50 U. S. C. App. 1894 (b)). On June 13, 1950, prior to enactment of the 1950 Act, and while the proposed Bill was in debate on the floor, Congressman Jacobs offered an amendment providing a right of judicial review in those cases (Cong. Rec. 8665, June 13, 1950). After debate, the amendment was rejected (Ibid., 8666–8667). It is therefore difficult to conclude that the appellants herein have any right to relief by the Courts in a case of this character.

V

The complaint fails to state a claim upon which relief may be granted

Finally, the complaint should be dismissed because it fails to state a claim upon which relief may be granted.

1. The court below held the action was premature. At the time of the ruling below, this was correct. Since the Housing Expediter has now rejected the city resolution, the action is no longer premature.

2. The complaint is based upon the premise that the resolution adopted by the City Council of Los Angeles was valid and as such had the effect of terminating rent controls regardless of whether or not the Housing Expediter terminated controls. In view of the decision of the Appellate Court for the District of Columbia in *Babcock* v. *Woods,* supra, holding the resolution to be invalid, and since the City of Los Angeles intervened in the action and is bound as a party by the decision rendered in it, the premise respecting the validity of the resolution of the City Council no longer has any foundation. Since the premise falls, appellants' case based thereon cannot stand either.

3. It would also appear that appellants no longer qualify for injunctive relief. Injunctive relief is a preventive remedy for the future, not as punishment for the past. "The historic injunctive process was designed to deter, not to punish" (*Hecht Co.* v. *Bowles,* 321 U. S. 321, 329). Injunction will not issue to prohibit the doing of things that have already been

done (*Femmer* v. *City of Juneau,* 97 F. 2d 649 (C. A. 9th). As matters stand now, it is difficult to see how injunctive relief would aid the appellants for the future. Merely one more month of federal rent control remains for tenants of Los Angeles. In view of the 30-day notice provision for increased rent under local law, landlords would be required to wait in any event until January 1951 to be entitled to receive more than the present maximum rental in any event.

Thus the two individual appellants will not sustain any loss of rent income if matters are left in status quo. Second, while they claim they can now sell their properties at highly appreciated values, if freed from control, there is no reason to believe that prices for their property will be lower on January 1, 1951, when rent controls are due to be lifted. The contrary is to be expected as a simple matter of the laws of supply and demand, since pressures are bound to be greater than ever for purchasing homes at that time.

Appellants' contention is, however, that if injunctive relief is granted, the court's ruling would constitute an adjudication that they were free from all violations from August 1950 when the Council approved the resolution until now. It is not a basis for invoking the aid of a court of equity to grant injunctions in order to allay fears of suit.

For all that appears here, the individual appellants may not ever be sued because they may not have violated. While appellants in prior oral argument suggested the possibility of action against them for violation of the Act from the time the City Council adopted its resolution, certainly there is no allegation

in the complaint that appellants have disobeyed existing rent ceilings and seek protection from this Court for their past wrongs or that suit is being threatened. We may not go outside the record to conjure up violations which are not alleged or which may not exist. And we have no right to give any consideration here to the possibility that other landlords, not parties to this suit, have flouted the law since the City Council acted. It is equally clear that injunctive relief should not be granted on the remote and speculative premise that appellants have either violated or that some other landlords, not parties to the suit, have violated during the last six months. For these reasons, the possibility of future enforcement of the Act as to these landlords is too uncertain and contingent to warrant judicial determination. Cf. *Eccles* v. *People's Bank of Lakewood Village,* 333 U. S. 426, 431.

4. In addition, appellants have an adequate remedy at law. They can test the validity of the Housing Expediter's action by proceeding as if federal rent control has terminated. If and when sued for overcharges or injunctive relief, they can set up as a defense the very contentions advanced to the court below and to this Court that decontrol under Section 204 (j) (3) is self-executing (Cf. *F. T. C.* v. *Claire Furnace Co.,* 274 U. S. 160; *S. J. Groves & Sons Co.* v. *Warren,* 135 F. 2d 264 (App. D. C.), cert. den. 319 U. S. 766; *Bell Oil & Gas Co.* v. *Wilbur,* 50 F. 2d 1070, 1071 (App. D. C.); *Campbell* v. *Medalie,* 71 F. 2d 671, 672 (C. A. 2d)).

As was said in *F. T. C.* v. *Claire Furnace Co., supra* (274 U. S. at p. 174):

> Until the Attorney General acts, the defendants cannot suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.

5. Moreover, appellants have not alleged facts constituting such irreparable injury as will justify a court of equity in granting the extraordinary remedy of injunctive relief or mandamus against a government official such as is prayed for here. (Cf. *Coffman* v. *Federal Laboratories, Inc.* (United States, Intervenor, 55 F. Supp. 501, at 506 (D. C. N. J. 3 judge court) aff'd sub. nom. *Coffman* v. *Breeze Corporations,* 323 U. S. 316); *Boston Wool Trade Association* v. *Snyder,* 161 F. 2d 648 (App. D. C.).)

What is the damage the individual appellants assert they will sustain as a result of the alleged unlawful action of appellees? It is that their rent rolls may be decreased and that they may not be able to sell their property for all that the traffic will bear in an uncontrolled rental market. Thus plaintiff Hess alleges she can sell her property now valued at $18,000 for $30,000 if rent controls are lifted; and that her rents will be slightly more than 100% higher upon decontrol (Par. 9 of Complaint). Plaintiff Westberg alleges that his property now valued at $5,000, would appreciate 400% or $20,000 if controls are lifted, and that his rents could be raised slightly less than 100% in a market free from control (Par.

II of 2nd cause of action p. 12 of Complaint). The net sum and effect of these allegations is that the alleged unlawful action of the appellees is preventing these two individual appellants from making a "killing" in a tight rental market.[9] Be that as it may, and assuming the money damage as alleged, it is not such damage which a court of equity will consider as irreparable. As was said in *Boston Wool Trade Association* v. *Snyder,* 161 F. 2d 648, 82 U. S. App. D. C. 144 "Appellants urge irreparable damage, but the damage is a money damage, consisting of the difference between the duties under the two paragraphs of the Act * * *. Such damage is not regarded by equity as irreparable" (p. 649).

VI

The court below properly exercised its equitable discretion in refusing to grant either the temporary restraining order or the preliminary injunction.

If the motion to dismiss the complaint was properly granted, it necessarily follows that the court below was equally right in denying the application for temporary restraining order and injunction. However, even if it could possibly be said that error was committed in granting the motion to dismiss, it is plain that the court below acted well within its equitable discretion in refusing to grant preliminary injunctive relief in this case. (Cf. *Hecht Co.* v. *Bowles,* 321

[9] It should be noted that the Act and Rent Regulations do not prohibit landlords from selling their property. They can sell now. Landlords are merely prohibited from evicting tenants for purposes of selling their property. See *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3d).

U. S. 321; *Bowles* v. *Huff,* 146 F. 2d 428 (C. A. 9th); *Porter* v. *Lux,* 157 F. 2d 756 (C. A. 9th).

From earliest times, this Court has repeatedly held that the granting or refusal of temporary injunction rests in the District Court's discretion, the exercise of which in the absence of manifest abuse, is not reviewable (*Southern Pac. Co.* v. *Earl,* 82 Fed. 690, 692 (C. A. 9th)). "A decree of a district court, denying an injunction, should not be reversed unless shown to be contrary to some recognized rule of equity or be the result of an improvident exercise of judicial discretion" (*Bowles* v. *Huff, supra* at p. 431). It was said in *Alabama* v. *United States,* 279 U. S. 229, 230–231, where the District Court denied an application for a preliminary injunction to set aside orders of the Interstate Commerce Commission:

> * * * It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. * * *

And in *Hurley* v. *Kincaid,* 285 U. S. 19, Justice Brandeis speaking for the Supreme Court said (p. 104, footnote 3):

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear

showing that its intervention is necessary in order to prevent an irreparable injury.

From these authorities and the facts of this case, the court below unquestionably acted well within its sound equitable discretion in denying injunctive relief.

CONCLUSION

The decision of the court below is clearly right. Appellants' contentions to the contrary are lacking in merit. The order of the court below should be affirmed in all respects.

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APPENDIX

The Housing and Rent Act of 1947, as Amended

(Public Law 129, Eightieth Congress, approved June 30, 1947, as amended by Public Law 422, Eightieth Congress, approved February 27, 1948, Public Law 464, Eightieth Congress, approved March 30, 1948, Public Law 31, Eighty-first Congress, approved March 30, 1949, and Public Law 574, Eighty-first Congress, approved June 23, 1950.)

Sec. 204. (d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

(e) (1) The Housing Expediter is authorized and directed to create and, if necessary, continue in existence until the termination of this Act in each defense-rental area (whether or not under Federal rent control) or such portion thereof as he may designate, local advisory boards. The Housing Expediter shall, whenever in his judgment there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended, prior to March 1, 1947, as an area where defense activities have resulted * * *.

Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class

of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title; and

(C) Operations generally of the local rent office with particular reference to hardship cases. * * *

SEC. 204 (e) (3) Upon receipt of any recommendation from a local board, the Housing Expediter shall promptly notify the local board, in writing, of the date of his receipt of such recommendation. Except as provided hereinafter in this subsection, within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect. If the Housing Expediter approves or disapproves any recommendation of a local board he shall promptly notify the local board in writing of such action.

* * * * *

Any representative group of interested parties or the local board may file a complaint concerning such recommendation with the Emergency Court of Appeals within thirty days after the date on which the Housing Expediter notifies the local board of his decision, or the date of the expiration of such thirty-day period, as the case may be. If the Housing Expediter holds the hearing, such group may file a complaint with the Emergency Court of Appeals within thirty days after the rendering of his decision, or within thirty days after the expiration of the time within which his decision should be made. A similar right of appeal shall be afforded in the event the Housing Expediter makes a decision as to a general adjustment or as to removal of maximum rents for any class of housing accommodations (other than for luxury housing accommodations under the second sentence of section 204 (c)) on his own initiative. The Clerk of the Emergency Court of Appeals shall notify the Housing Expediter in writing of the filing of any such complaint promptly after it has been so filed. Within fifteen days after the receipt of such notice by the Housing Expediter, the Housing Expediter shall file such recommendation or decision in the Emergency Court of Appeals, together with the record and statement of findings of the local board or of the Housing Expediter and such statement as the Housing Expediter may desire to make as to his views on the matter. The statement of the Housing Expediter may be accompanied by such supporting information as the Housing Expediter deems appropriate. Thereupon, the Emergency Court of Appeals shall have jurisdiction to enter, within sixty days after the date of its receipt of such recommendation or decision from the Housing Expediter (or within such additional period of not more than thirty days

as the court may find necessary in exceptional cases), an order approving or disapproving the recommendation of the local board or decision of the Housing Expediter. The recommendation, record, and statement of findings of the local board or decision, record, and statement of findings of the Housing Expediter, as the case may be, together with the statement and supporting information filed by the Housing Expediter, shall constitute the record before the court.

SEC. 204 (f) (1) The provisions of this title, except section 204 (a), shall cease to be in effect at the close of December 31, 1950, except that they shall cease to be in effect at the close of June 30, 1951—

(A) in any incorporated city, town, or village which, at a time when maximum rents under this title are in effect therein, and prior to December 31, 1950, declares (by resolution of its governing body adopted for that purpose, or by popular referendum, in accordance with local law) that a shortage of rental housing accommodations exists which requires the continuance of rent control in such city, town, or village; and

(B) in any unincorporated locality in a defense-rental area in which one or more incorporated cities, towns, or villages constituting the major portion of the defense-rental area have made the declaration specified in subparagraph (A) at a time when maximum rents under this title were in effect in such unincorporated locality.

(2) Any incorporated city, town, or village which makes the declaration specified in paragraph (1) (A) of this subsection shall notify the Housing Expediter in writing of such action promptly after it has been taken.

(j) (1) Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establish-

ment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(2) If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town, village, or in the unincorporated area of any county upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town, village, or

unincorporated area in such county: *Provided,* That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period.

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which con-

stitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 905 (a)):

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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